

2006

# Robert Troy Jensen v. Scott Smith : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](https://digitalcommons.law.byu.edu/byu_ca2)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

David H. Epperson; David C. Epperson; Epperson and Rencher; Attorneys for Defendant/Appellee.  
Matthew T. Graff; Mark H. Graff; Matthew T. Graff and Associates; Attorneys for Plaintiff/  
Appellant.

---

## Recommended Citation

Brief of Appellee, *Jensen v. Smith*, No. 20060845 (Utah Court of Appeals, 2006).  
[https://digitalcommons.law.byu.edu/byu\\_ca2/6812](https://digitalcommons.law.byu.edu/byu_ca2/6812)

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

---

UTAH COURT OF APPEALS

---

ROBERT TROY JENSEN,	)	
	)	Appellate Case No. 20060845
Plaintiff/Appellant,	)	
	)	District Court No. 03-0502250
v.	)	
	)	
SCOTT SMITH, M.D.,	)	
	)	
Defendant/Appellee.	)	

---

**BRIEF OF APPELLEE**

DAVID H. EPPERSON, #1000  
DAVID C. EPPERSON, #10229  
EPPERSON & RENCHER  
10 West 100 South, Suite 500  
Salt Lake City, Utah 84101  
(801) 983-9800

Attorneys for Defendant/Appellee  
Scott Smith, M.D.

MATTHEW T. GRAFF  
MARK H. GRAFF  
MATTHEW T. GRAFF & ASSOCIATES  
1957 W. Royal Hunte Drive, Suite 200  
Cedar City, Utah 84720  
(435) 586-5115

Attorneys for Plaintiff/Appellant

FILED  
UTAH APPELLATE COURTS  
JAN 11 2007

---

UTAH COURT OF APPEALS

---

ROBERT TROY JENSEN,	)	
	)	Appellate Case No. 20060845
Plaintiff/Appellant,	)	
	)	District Court No. 03-0502250
v.	)	
	)	
SCOTT SMITH, M.D.,	)	
	)	
Defendant/Appellee.	)	

---

**BRIEF OF APPELLEE**

DAVID H. EPPERSON, #1000  
DAVID C. EPPERSON, #10229  
EPPERSON & RENCHER  
10 West 100 South, Suite 500  
Salt Lake City, Utah 84101  
(801) 983-9800

Attorneys for Defendant/Appellee  
Scott Smith, M.D.

MATTHEW T. GRAFF  
MARK H. GRAFF  
MATTHEW T. GRAFF & ASSOCIATES  
1957 W. Royal Hunte Drive, Suite 200  
Cedar City, Utah 84720  
(435) 586-5115

Attorneys for Plaintiff/Appellant

**LIST OF PARTIES ON APPEAL**

The caption contains a list of all parties involved in this appeal.

## TABLE OF CONTENTS

<b>JURISDICTION .....</b>	<b>1</b>
<b>STATEMENT OF ISSUES &amp; STANDARDS OF REVIEW .....</b>	<b>1</b>
<b>DETERMINATIVE STATUTORY PROVISIONS .....</b>	<b>2</b>
<b>STATEMENT OF THE CASE.....</b>	<b>2</b>
Nature of the Case .....	2
Course of Proceedings & Disposition Below.....	3
<b>RESPONSE TO PLAINTIFF’S STATEMENT OF FACTS .....</b>	<b>6</b>
<b>SUMMARY OF ARGUMENT.....</b>	<b>7</b>
<b>ARGUMENT.....</b>	<b>8</b>
<b>THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT.....</b>	<b>8</b>
<b>THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFF’S 56(f) AFFIDAVIT AND REQUEST FOR ADDITIONAL TIME.....</b>	<b>10</b>
<b>PLAINTIFF’S <i>RES IPSA LOQUITUR</i> ARGUMENT SHOULD BE DISREGARDED AS IT WAS NOT RAISED IN THE TRIAL COURT NOTWITHSTANDING THE DOCTRINES CLEAR INAPPLICABILITY TO THE FACTS OF THIS CASE.....</b>	<b>12</b>
<b>CONCLUSION .....</b>	<b>15</b>

## **TABLE OF AUTHORITIES**

### **Cases**

<u>Arnold v. Curtis</u>	
846 P.2d 1307, (Utah 1993) .....	7, 9, 12, 15
<u>Bangerter v. Poulton</u>	
663 P.2d 100, (Utah 1983) .....	12
<u>Carrier v. Salt Lake County</u>	
104 P.3d 1208, (Utah 2004) .....	2, 7, 13
<u>Crossland Savings v. Hatch</u>	
877 P.2d 1241, 1243, (Utah 1994) .....	7, 10
<u>Dalley v. Utah Valley Reg'l Med. Ctr.</u>	
791 P.2d 193, 195-96 (Utah 1990) .....	8, 13
<u>Grynberg v. Questar Pipeline Co.</u>	
70 P.3d 1, (Utah 2003) .....	1
<u>Hoopiiaina v. Intermountain Health Care</u>	
740 P.2d 270, 271 (Utah App. 1987) .....	8
<u>Pete v. Youngblood</u>	
141 P.3d 629 (Utah 2006) .....	13, 14
<u>Salt Lake County v. Western Dairymen Cooperative, Inc.</u>	
48 P.3d 910, (Utah 2002) .....	11
<u>Treff v. Hinckley</u>	
26 P.3d 212, 215, (Utah 2001) .....	13

### **Statutes**

Utah Code Ann. § 78-2a-1 .....	1
--------------------------------	---

### **Rules**

Rule 26(f) Utah Rules of Civil Procedure .....	4
Rule 26, Utah Rules of Civil Procedure .....	2, 7, 12
Rule 56(f), Utah Rules of Civil Procedure .....	10
Rule 6(b) of the Utah Rules of Civil Procedure .....	9
Utah R. App. P. 3 .....	1

## **JURISDICTION**

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-1 and Utah R. App. P. 3.

## **STATEMENT OF ISSUES & STANDARDS OF REVIEW**

**1. In this action for medical malpractice, Plaintiff failed to timely designate or come forward with a standard of care expert in orthopedic surgery to establish the requisite elements of Duty of Care, Breach of Duty and Causation against Defendant, Dr. Smith as required by Utah law. Plaintiff now appeals the trial Courts granting of Summary Judgment to Defendant, Dr. Smith. Plaintiff asserts that he made proper use of a Rule 56(f) affidavit as a defense to Defendant's Motion for Summary Judgment and that the trial Court improperly dismissed this action. Standard of Review: The Appellate Court reviews for abuse of discretion the trial court's ruling on a motion for additional discovery before summary judgment per Rule 56(f). Grynberg v. Questar Pipeline Co., 70 P.3d 1, (Utah 2003).**

**2. Plaintiff raises an alternative argument based upon the doctrine of *Res Ipsa Loquitur* which argument was not made before the Trial Court and is now raised for the first time on appeal. Defendant asserts that the doctrine of *Res Ipsa Loquitur* does not apply to the facts of this case notwithstanding the clear precedent that defenses and claims not raised by parties in trial court**

**cannot be considered for the first time on appeal.** Standard of Review: As a general rule the Supreme Court declines to address issues raised for the first time on appeal. Carrier v. Salt Lake County, 104 P.3d 1208, (Utah 2004)

### **DETERMINATIVE STATUTORY PROVISIONS**

1. Utah Rules of Civil Procedure, Rule 56(f) provides:

**(f) When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

2. Rule 26, Utah Rules of Civil Procedure

3. Rule 6(b), Utah Rules of Civil Procedure

4. Rule 56, Utah Rules of Civil Procedure

### **STATEMENT OF THE CASE**

A. Nature of the Case.

This medical malpractice action is brought against Scott Smith, M.D. by former patient, Robert Troy Jensen. Plaintiff suffers from a long history of Lupus. Since 1996 Plaintiff suffered from a large ulcer and wound on his lower left leg which was treated with multiple skin grafts by a plastic surgeon which grafts were ultimately unsuccessful. In April of 2000, Plaintiff's plastic surgeon recommended a below the knee amputation and Plaintiff was referred to Defendant, Dr. Smith, in

late April, 2000. On May 3, 2000, Defendant performed a below the knee amputation on Plaintiff. Plaintiff sustained wound healing complications including infection of his left stump. On June 29, 2001, Defendant performed revision surgery to close the wound that failed to heal. Plaintiff ultimately left Defendant's care and had an above the knee amputation performed. Plaintiff claims that Defendant, Dr. Smith, was negligent in performing the below the knee amputation and that an above the knee procedure should have been performed instead.

**B. Course of Proceedings & Disposition Below.**

1. A complaint was filed by Plaintiff in Fifth District Court, Washington County on or about December 5, 2003. (R.1-7).

2. Defendant's answer to Plaintiff's complaint was filed on or about January 12, 2004. (R.12-16).

3. No discovery scheduling conference was held and no stipulated discovery plan was prepared or submitted to the Court. Rule 26(f) U.R.C.P. places the burden on Plaintiff's counsel to schedule the conference and file the discovery plan. (R.133, 135, 136)

4. On or about April 2, 2004, Defendant served interrogatories and written discovery on Plaintiff. (R.17)

5. Plaintiff served written discovery on Defendants on or about October 18, 2004. (R.26)



6. The depositions of Plaintiff, Robert Jensen, and Defendant, Dr. Smith were taken on January 11, 2005. (R.21-23, 24-25, 30-31, 32-33)

7. In a letter dated June 27, 2005 to Plaintiff's counsel, counsel for Dr. Smith requested deadlines be set for the completion of expert discovery, which deadlines were never set. (R.56)

8. In a letter dated March 21, 2006 to Plaintiff's counsel, counsel for Dr. Smith again requested that Plaintiff designate her experts, warning that summary judgment would be sought if such designations were not provided within two weeks. (R.57)

9. On March 21, 2006, Defendant filed his Designation of Expert Witnesses listing Dr. Robert Rhodes (Plastic Surgeon) as a damage and causation expert witness, and Dr. Timothy Beals (Orthopedic Surgeon) as a standard of care expert witness. (R.35-44, 53-55).

10. Counsel for Defendant received no response to their repeated requests for expert designation from Plaintiff's counsel and on or about April 21, 2006 Defendant filed a Motion for Summary Judgment with supporting expert affidavit of Timothy C. Beals, M.D. (R.68-69, 45-67).

11. Plaintiff requested a two week extension to respond to Defendants Motion, which extension was graciously granted by Defendant. (R.125)

12. On or about May 22, 2006, Plaintiff filed a “Memorandum in Opposition to Summary Judgment” along with an Affidavit of Matthew T. Graff. (R.74-79, 70-73).

13. On or about May 26, 2006, Defendant filed a “Reply to Plaintiff’s Motion in Opposition to Motion for Summary Judgment” (R.90-93).

14. On or about May 26, 2006, Defendant filed his “Request to Submit for Decision” (R.94-95).

15. On or about June 2, 2006, Plaintiff filed an objection to Defendant’s Request to submit for decision and requested Oral Argument on the pending Motion for Summary Judgment. (R.96-97, 98-100).

16. On or about August 4, 2006, Plaintiff filed the Affidavit of Barry E. Gustin, M.D. (R.101-105).

17. Plaintiff filed his Designation of Expert Witnesses on or about August 11, 2006. (R.106-116).

18. Defendant’s Motion to Strike the Affidavit of Barry E. Gustin, M.D. and Second Request to Submit for Decision with Memorandum in Support were filed on or about August 14, 2006. (R.117-118, 119-131).

19. The Memorandum Decision and Order Granting Defendant’s Motion for Summary Judgment was signed by Judge Eric A. Ludlow on August 17, 2006 and was filed on August 21, 2006. (R.132-140).

20. Plaintiff filed a Memorandum in Opposition to Defendant's Memorandum in Support of Motion to Strike on or about August 24, 2006. (R.141-147).

21. On August 29, 2006 Judge Ludlow ruled that Defendant's Motion to Strike was moot as Summary Judgment had already been granted. (R.148-149).

22. Plaintiff filed his Notice of Appeal on or about September 12, 2006. (R.150-152).

### **RESPONSE TO PLAINTIFF'S STATEMENT OF FACTS**

Defendant, Dr. Smith, asserts that he performed a below the knee amputation on Plaintiff on May 3, 2000 (not 2006). Defendant disputes Plaintiff's characterization of described "failures" in his surgical technique in performing Plaintiff's below the knee amputation. The medical treatment rendered to Plaintiff by Dr. Smith has been fully supported as being appropriate and within the standard of care by Defendant's orthopedic expert, Timothy C. Beals, M.D. (R.53-55). Defendant agrees that Plaintiff sustained wound healing complications including infection of his left stump.

Due to these healing complications, Plaintiff required revision surgery to close the wound which surgery was performed on June 29, 2001, by Dr. Smith. Plaintiff ultimately left Defendant's care and eventually had an above the knee amputation performed by another surgeon.

## **SUMMARY OF ARGUMENT**

1. The Trial Court properly found that Plaintiff failed to comply with the provisions of Rule 26 of the Utah Rules of Civil Procedure and further failed to comply with Rule 26's default deadlines for expert witness designation. The Trial Court did not abuse its discretion in refusing to consider Plaintiff's Rule 56(f) request as no proper motion was before the Court. The Trial Court properly ignored Plaintiff's late expert designation and expert affidavit and had discretion to do so pursuant to Arnold v. Curtis, 846 P.2d 1307, (Utah 1993).

2. Plaintiff had ample time to retain an expert witness to support his claims against Dr. Smith for medical negligence as required by Utah law. The Trial Court acted within its discretion and "need not grant Rule 56(f) motions that are dilatory or lacking in merit." Crossland Savings v. Hatch, 877 P.2d 1241, 1243, (Utah 1994).

3. Plaintiff's alternative *Res Ipsa* argument does not apply to the facts of this case as this case involves complex medical issues which are outside the common knowledge and experience of the layman. Furthermore, Plaintiff's *Res Ipsa* defense should be disregarded by this Court as such defense was not raised by Plaintiff to the Trial Court and is now being raised for the first time on appeal. Carrier v. Salt Lake County, 104 P.3d 1208, (Utah 2004).

## ARGUMENT

### **I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT.**

As set forth by the Trial Court’s Memorandum Decision and Order (R.132-140), Utah law generally requires the establishment of medical negligence through expert testimony. *See Dalley v. Utah Valley Reg’l Med. Ctr.*, 791 P.2d 193, 195-96 (Utah 1990); *Hoopiiaina v. Intermountain Health Care*, 740 P.2d 270, 271 (Utah App. 1987). Plaintiff made no argument against this general rule to the Trial Court. (R.134). The Trial Court correctly analyzed the provisions of Rule 26 including the purpose of the required attorney’s planning meeting and discovery plan and order, noting that the rule imposes upon Plaintiff’s counsel the obligation to submit same. (R. 135-136). The Trial Court found that Plaintiff’s expert designations were not timely filed pursuant to the default deadlines of Rule 26(f). (R.135, 136, 137)

The Trial Court noted that Plaintiff did not file a Rule 56(f) motion, instead he only cited to Rule 56(f) and requested additional discovery. (R.137). The Trial Court reasoned that Rule 56(f) was not the proper provision under which to seek an extension of time and noted that such extensions are governed by Rule 6(b) of the Utah Rules of Civil Procedure. (R.137). Notwithstanding Plaintiff’s failure to file a Rule 6(b) motion, the Trial Court held that Plaintiff did not make the showing necessary to allow the Court to grant it:

The only grounds articulated for the request are the complexity of the case and Jensen's counsel's inability to secure an expert within the designated time period. Both of these assertions may well be true, but Jensen has not alleged any impediment to his ability to request additional time to designate expert witnesses prior to the expiration of the time allowed under Rule 26. He has therefore failed to establish the "excusable neglect" required by Rule 6(b). (R.138)

Plaintiff filed their Affidavit of Barry E. Gustin, M.D. (R.127) over two months after the Summary Judgment motion had been fully briefed and submitted for decision. Plaintiff never formally requested leave of the Trial Court to file additional affidavits in opposition to Summary Judgment and the Trial Court properly ignored Plaintiff's delinquent affidavit in its ruling on Summary Judgment. *See Arnold v. Curtis*, 846 P.2d 1307, (Utah 1993)(Holding that trial courts refusal to consider expert affidavit submitted in opposition to motion for summary judgment on ground that affiant was not identified as possible witness before deadline established in scheduling order, was not abuse of discretion.)

Defendant, Dr. Smith, on numerous occasions requested that Plaintiff designate an expert witness and gave fair warning that the failure to do so would result in Defendant's request for summary judgment. (R.56, 57) Plaintiff failed to timely designate a medical expert critical of Dr. Smith's care and the Trial Court acted within its discretion in granting Defendant's Summary Judgment Motion. Wherefore, Defendant, Dr. Smith respectfully requests that this Court affirm the Trial Court's ruling and that Summary Judgment be upheld.

## **II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFF'S 56(f) AFFIDAVIT AND REQUEST FOR ADDITIONAL TIME.**

Utah Rules of Civil Procedure, Rule 56(f) provides:

**(f) When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court *may* refuse the application for judgment or *may* order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or *may* make such other order as is just. (*Emphasis added*)

Based upon the permissive language of Rule 56(f), it is clearly within the Trial Court's discretion to grant or deny a request for a continuance. Plaintiff failed to file a formal Rule 56(f) Motion, and merely referred to Rule 56(f) in his Memorandum in Opposition and Attorney Affidavit. (R.70-73, 74-79). As pointed out by the Trial Court in its Memorandum Decision, Plaintiff did not file a proper Rule 56(f) motion. (R.137, footnote 4).

The Utah Supreme Court has held that "the trial court need not grant rule 56(f) motions that are dilatory or lacking in merit." Crossland Savings v. Hatch, 877 P.2d 1241, 1243, (Utah 1994). The Supreme Court in Crossland reviewed the Trial Courts denial of a 56(f) Motion under the abuse of discretion standard and held, under the facts of that case, that the trial court "could have reasonably concluded that a diligent litigant should have completed the necessary discovery in this case within the four-month period." Crossland, 877, P.2d at 1244.

In Salt Lake County v. Western Dairymen Cooperative, Inc., 48 P.3d 910, (Utah 2002), the Utah Supreme Court thoroughly analyzed Rule 56(f) case law to determine under what circumstances such motions should be granted. (See Western Dairymen, 48 P.3d at 917-918) The Supreme Court reiterated its position that Rule 56(f) motions should be granted liberally unless they are deemed dilatory or lacking in merit. (See Western Dairymen, 48 P.3d at 917) However, the Court also set forth situations in which 56(f) motions were properly denied, including situations where a party delayed four months in initiating discovery; and, situations in which Plaintiff had “unlimited access” to the information necessary to demonstrate a dispute regarding a genuine issue of material fact. (See Western Dairymen, 48 P.3d at 917)

Considering the facts of this case, the Trial Court did not abuse its discretion in denying Plaintiff’s Rule 56(f) “motion” and request for additional time. Plaintiff had ample time to retain an expert witness to support his claims against Dr. Smith for medical negligence as required by Utah law. Plaintiff first filed this medical malpractice action in December 2003. Plaintiff knew or should have known at that time that expert testimony would be required to support his claims for medical negligence. Plaintiff’s contention that “discovery has not been completed within the time allotted by Rule 26 U.R.C.P. because of the complexity of this case” is not supported by this case’s history. Defendant asserts that the “complexity” of this



case was not the reason that discovery has not been completed, but rather it is due to Plaintiff's failure to do anything to move this case forward since the depositions of the parties were taken in January, 2005. Furthermore, Plaintiff has had unlimited access to medical experts for years and still failed to timely designate a standard of care expert critical of Defendant, Dr. Smith's care.

Therefore, under these facts, the Trial Court under its discretion could find Plaintiff's Rule 56(f) "motion" to be dilatory or lacking in merit. Furthermore, the Trial Court also had discretion to disregard Plaintiff's late designation of expert witnesses pursuant to the Utah Supreme Courts holding in Arnold v. Curtis, 846 P.2d 1307, (Utah 1993).

**III. PLAINTIFF'S *RES IPSA LOQUITUR* ARGUMENT SHOULD BE DISREGARDED AS IT WAS NOT RAISED IN THE TRIAL COURT NOTWITHSTANDING THE DOCTRINES CLEAR INAPPLICABILITY TO THE FACTS OF THIS CASE.**

Plaintiff's alternative argument based upon the Doctrine of *Res Ipsa Loquitur* has no application to the facts of this case; but more importantly, such issue was not raised before the Trial Court and is now being raised for the first time on appeal. The Utah Supreme Court has repeatedly refused to consider new defenses, claims, or issues that were not raised before the Trial Court which are raised for the first time on appeal. See Bangerter v. Poulton, 663 P.2d 100, (Utah 1983) (Defenses and claims not raised by parties in trial court cannot be considered for first time on

appeal); Carrier v. Salt Lake County, 104 P.3d 1208, (Utah 2004) (As a general rule the Supreme Court declines to address issues raised for the first time on appeal.); Treff v. Hinckley, 26 P.3d 212, 215, (Utah 2001) (The Supreme Court will not address any new arguments raised for the first time on appeal.)

Plaintiff raised no *Res Ipsa* argument in any of his summary judgment briefing before the Trial Court. (R.74-79) Wherefore, it would be improper for this Court to review that defense which is being raised for the first time on appeal.

Notwithstanding the above, the Doctrine of *Res Ipsa Loquitur* has no application to the facts of this case. As pointed out by the Trial Court, Plaintiff does not argue against the general rule that the establishment of medical negligence generally requires expert testimony as set forth in Dalley v. Utah Valley Reg'l Med. Ctr., 791 P.2d 193, 195-96 (Utah 1990) and Hoopiiiania v. Intermountain Health Care, 740 P.2d 270, 271 (Utah App. 1987). (R.134)

In his Appellate Brief, Plaintiff cites Pete v. Youngblood, 141 P.3d 629 (Utah 2006) to support his contention that this case falls within the “common knowledge and experience of the layman” exception to the requirement for expert testimony in medical malpractice actions. The Youngblood case dealt with a classic *Res Ipsa* fact scenario of a retained sponge following a surgical procedure. In Youngblood, this Court discussed other *Res Ipsa* fact patterns where no medical expert testimony was required which include: the loss of a surgical instrument or

sponge in the operating site; leaving a needle in a patient; and, a burn from a heating pad during surgery. Youngblood, 141 P.3d at 636.

This case clearly does not fit the *Res Ipsa* exception and examples as outlined by the Court in Youngblood. *Supra*. Plaintiff's argument that the surgical performance of a below the knee amputation is within the "common knowledge and experience of the layman" is unfounded. One would certainly hope that the technical performance of leg amputations is not within the common knowledge and life experience of lay jurors. Plaintiff has attempted to oversimplify the surgical procedure by claiming that "too much skin was removed from the leg," which is not only misleading, but it fails to consider other factors of medical experience and judgment used by Dr. Smith. These factors include the amount of viable tissue that Dr. Smith had to work with as well as the appropriate surgical technique based upon this patient's presentation.

Defendant has retained Timothy C. Beals, M.D., as an orthopedic surgery standard of care expert. (R.35-44) Dr. Beals is currently the head of the Amputee Division of the Orthopedic Department at the University of Utah Medical Center. In his affidavit, Dr. Beals renders the opinion that the medical treatment Dr. Smith provided to Mr. Jensen was within the standard of care, the decision to perform a below the knee amputation was appropriate, and the surgical technique and approach used by Dr. Smith was appropriate and within the standard of care. (R.53-

55) Dr. Beals has also rendered the opinion that Plaintiff's wound healing complications are known complications of this type of surgery and were not caused by a breach of care or negligence. (R.55)

Clearly, the medical issues in this case are outside the common knowledge and experience of a layman and therefore expert testimony is required and Plaintiff's *Res Ipsa* argument must fail. For these reasons the Court should affirm the Trial Court's granting of Summary Judgment.

### **CONCLUSION**

The Trial Court did not abuse its discretion in granting Defendant's Motion for Summary Judgment. Plaintiff failed to make a proper Rule 56(f) Motion and failed to comply with Rule 26 and its default deadlines. The Trial Court exercised proper discretion to disregard Plaintiff's delinquent expert affidavit, filed months after the Summary Judgment briefing was submitted for decision pursuant to Arnold v. Curtis, 846 P.2d 1307, (Utah 1993). Accordingly, this Court should reject Plaintiff's claim that the Trial Court erred in granting Defendant's Motion for Summary Judgment.

Additionally, Plaintiff's alternative *Res Ipsa* argument, notwithstanding the doctrines clear inapplicability to the facts of this case, should be disregarded by this Court as such defense was not raised by Plaintiff to the Trial Court and is now being raised for the first time on appeal. The Court should decline to consider

Plaintiff's *Res Ipsa* argument, or alternatively, rule that, even if considered, such argument does not apply to this case and would not have changed the outcome of the Trial Court's ruling.

Finally, this Court should hold that the Trial Court did not abuse its discretion in refusing to grant Plaintiff's Rule 56(f) "motion" and request for additional time.

In short, this Court should affirm the judgment of the Trial Court.

RESPECTFULLY SUBMITTED this 11 day of January, 2007.

**EPPERSON & RENCHER**

A handwritten signature in black ink, appearing to read 'D. Epperson', with a long horizontal line extending to the right.

DAVID H. EPPERSON

DAVID C. EPPERSON

Attorneys for Defendant/ Appellee

Scott Smith, M.D.

**CERTIFICATE OF MAILING**

I certify that two true and correct copies of the foregoing *Brief of Appellee*  
was served via U.S. Mail, postage prepaid, this 11 day of January, 2007, to:

Matthew T. Graff  
MATTHEW T. GRAFF & ASSOCIATES  
1957 W. Royal Hunte Drive, Suite 200  
Cedar City, Utah 84720

A handwritten signature in black ink, appearing to read 'M. T. Graff', is written over a horizontal line.